STATE OF MICHIGAN

IN THE SUPREME COURT

FRASER TREBILCOCK DAVIS & DUNLAP, P.C.	Supreme Court No. 148931
Plaintiff-Appellee/Cross-Appellant,	Court of Appeals Docket Nos. 302835, 305149 and 307002
v	
BOYCE TRUSTS 2350, 3649, and 3650,	Midland County Circuit Court Case No.: 09-6135-CZ-L
Defendants-Appellants/Cross-Appellee	

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PLAINTIFF-APPELLEE/CROSS-APPELLANT'S REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL AS CROSS-APPELLANT

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Rules

INTRODUCTION

This Reply Brief addresses the Defendants' erroneous assertion that there is both a "temporal" (before the entry of the Final Judgment) and "causal" (because of the rejection of case evaluation) nexus between the rejection of case evaluation and the prevailing party's right to recover case evaluation sanctions.[1] There is no temporal nexus. There is only a "causal nexus" which the Plaintiff has satisfied. However, even if there is a temporal nexus, the Trial Court's proceedings to determine the amount of the case evaluation sanctions which the Defendant must pay occurred within that "temporal nexus."[2]

STATEMENT OF FACTS

Judgment Date

The Midland County Circuit Court entered its Judgment in favor of the Plaintiff on December 17, 2010.[3]

Post-Judgment Proceedings

Fraser Trebilcock filed its Motion for Case Evaluation Sanctions on January 14, 2011.[4] This was within 28 days after the judgment date of December 17, 2010. On February 4, 2011, the Trial Court conducted a hearing on the Plaintiff's motion and on the Defendants' Motion for a New Trial.[5] On February 15, 2011, the Trial Court denied the Defendants'

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[1] Defendants' Brief in Opposition to Plaintiff's Application for Leave to Appeal as Cross-Appellant, pp. 7-15.

[2] The Plaintiff's alternative argument regarding its satisfaction of the "temporal nexus" criteria is without prejudice to and does not waive the Plaintiff's arguments in its Brief in Opposition to the Defendants' Application for Leave to Appeal and/or the Plaintiff's Application for Leave to Appeal as Cross-Appellant or Argument I (B) and (C) in this Reply Brief, *infra*.

[3] Exhibit 1.

[4] Case Register of Actions, Entries 120-122, p. 6.

[5] February 4, 2011 Tr.

Motion for a New Trial.[6] On that day, the Trial Court also found that the Plaintiff, as the prevailing party, had a right to recover case evaluation sanctions and scheduled an evidentiary hearing for March 9, 2011.[7]

Twenty-eight days from February 15, 2011 was March 15, 2011.[8] The March 9, 2011 evidentiary hearing date was within that 28-day period.

The March 9, 2011 hearing did not occur. The parties subsequently stipulated to the entry of an order regarding the taking of the *de bene esse* depositions of the parties' expert witnesses, the expedited filing of the deposition transcripts, the filing of post-deposition briefs, and the presentation of oral arguments on May 6, 2011.[9]

On June 29, 2011, the Trial Court issued its "Opinion and Order" which awarded the Plaintiff $80,434 in attorney fees and $4,316.45 in expenses, together with interest thereupon, for the time period from September 21, 2010 to March 3, 2011. Some of those attorney fees pertained to the case evaluation sanctions proceedings.[10] The Trial Court also granted the Plaintiff's request to seek an award of attorney fees from March 4, 2011 forward.[11]

On July 21, 2011, the Trial Court entered an Order consistent with its June 29, 2011 Opinion and Order.[12] The July 21, 2011 Order directed the Plaintiff to submit its request for

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[6] Exhibit 2, ¶1, p. 2.
[7] Exhibit 2, ¶¶2 and 4, p. 2.
[8] Exhibit 3 - February and March, 2011 calendar pages. This Court has the right to take judicial notice of the calendar. *See, Hoard v Stone,* 58 Mich 578, 582-583; 26 NW 141 (1886) ["the Court will take judicial notice that (a certain date) was a Sunday"]. *See* also, MRE 202(e) - judicial notice may be taken at any stage in a proceeding.
[9] Exhibit 4 - March 24, 2011 stipulated Order.
[10] Trial Court's June 29, 2011 Opinion and Order, pp. 21-23, a copy of which is Exhibit C attached to the Plaintiff's Brief in Court of Appeals Docket No. 305149.
[11] Exhibit C - Trial Court's June 29, 2011 Opinion and Order, p. 27, n. 135.
[12] Exhibit 5 - July 21, 2011 Order awarding reasonable attorney fees.

supplemental attorney fees from March 4, 2011 to the present within 28 days.[13] Fraser Trebilcock filed its Motion for Supplemental Attorney Fees within the allotted time on August 18, 2011.[14]

The Trial Court conducted a hearing on the Motion for Supplemental Attorney Fees on September 15, 2011.[15] At the conclusion of the hearing, the Court found that Fraser Trebilcock was unable to recover attorney fees for its post judgment collection activities and directed the parties to either stipulate as to the amount of those activities or file separate summaries regarding the amount of those non-recoverable fees after which the Court would issue a written opinion.[16] The parties submitted their respective post-hearing briefs thereafter.[17]

On October 18, 2011, the Trial Court issued its Opinion and Order in which it awarded $21,253.60 to Fraser Trebilcock for its attorney fees for March 4, 2011 through August 11, 2011.[18] On November 3, 2011 the Trial Court entered its Final Order Awarding Reasonable Attorney Fees and Taxation of Costs in Favor of the Plaintiff consistent with its October 18, 2011 Opinion and Order.[19]

[13] Exhibit 5, ¶4, p. 3.
[14] Case Register of Actions, Docket Entry 216, p. 10.
[15] Exhibit S - September 15, 2011 motion transcript.
[16] Exhibit S, p. 24.
[17] Case Register of Actions, items 231 (Plaintiff) and 233 (Defendants), p. 11.
[18] Exhibit 6.
[19] Exhibit 7.

ARGUMENT

THERE IS A CAUSAL NEXUS BETWEEN THE DEFENDANTS' REJECTION OF CASE EVALUATION AND THE PROCEEDINGS TO DETERMINE THE AMOUNT OF THE REASONABLE ATTORNEY FEES WHICH THE DEFENDANTS/REJECTORS OF CASE EVALUATION MUST PAY.

A. Standard of Review.

MCR 2.403(O)(1) provides that the party which rejected case evaluation "...must pay the opposing party's actual costs where the verdict is not more favorable to the rejecting party than the case evaluation." An award of case evaluation sanctions is mandatory.[20] The Court reviews *de novo* the question of law as to whether a Trial Court correctly granted case evaluation sanctions to a prevailing party under MCR 2.403(O).[21]

This case involves the proper interpretation and application of MCR 2.403. The interpretation and application of a court rule is a question of law which this Court reviews *de novo*.[22]

B. This Court has found that there is not a "temporal" nexus requirement between the rejection of case evaluation and case evaluation sanctions. Instead, there must be a "causal nexus" between the rejection of case evaluation and the case evaluation sanctions.

In *Haliw v Sterling Heights, supra*, the Court observed that the Court of Appeals had interpreted MCR 2.403(O)(6)(b)'s phrase "necessitated by the rejection" "... as a mere temporal demarcation."[23] However, the Court unanimously found that, "...the better-reasoned

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[20] *Allard v State Farm Insurance Co.*, 271 Mich App 394, 398; 722 NW2d 268 (2006).
[21] *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).
[22] *Haliw v Sterling Heights*, 471 Mich 700, 704; 691 NW2d 753 (2005).
[23] *Haliw, supra*, 471 Mich at 711, n. 8.

approach goes beyond a temporal demarcation and requires a causal nexus between rejection and incurred expenses."[24]

The Defendants' argument that there is a "temporal" restriction which limits an award of case evaluation sanctions to the fees for services rendered before the trial court enters its final judgment is contrary to this Court's rejection of a "temporal demarcation" in *Haliw*. Contrary to the Defendants' argument, there is no temporal limit. A prevailing party is not limited to receiving case evaluation sanctions for the services provided before the entry of a final judgment. Instead, *Haliw* requires a "causal nexus" between the rejection of case evaluation and the services necessitated by that rejection.

The Defendants' argument that the "temporal nexus" is limited to the time period before the entry of a judgment is also contrary to the words used in MCR 2.403(O)(8). The Court begins its interpretation and application of a court rule by examining a court rule's language.[25] MCR 2.403(O)(8) requires one to file a motion for case evaluation sanctions "within 28 days after the entry of the judgment **or** entry of an order denying a timely motion for a new trial or to set aside the judgment." (emphasis added). Even if MCR 2.403(O)(8) created a "temporal nexus," the time period extends to 28 days after the entry of an order denying a motion for new trial. The Defendants' argument is contrary to the court rule's language.

[24] *Haliw, supra,* 471 Mich at 711, n. 8.
[25] *Haliw, supra,* 471 Mich at 704-705.

C. The Trial Court's proceedings from January 14, 2011 through the entry of the Trial Court's November 3, 2011 Final Order were undertaken to determine the amount of the reasonable attorney fee which the Defendants/case evaluation rejectors must pay.

The Court begins its interpretation and application of a court rule by examining a court rule's language.[26] MCR 2.403(O)(1) provides that a party which has rejected case evaluation "...must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation evaluation." The Defendants rejected the case evaluation and the verdict was not more favorable to the Defendants than the mediation evaluation. This means that the Defendants, the rejectors of the case evaluation, must pay Fraser Trebilcock's reasonable attorney fees for the "services necessitated" by the Defendants' rejection of the case evaluation.[27]

There is a direct causal connection between the Defendants' rejection of case evaluation and the proceedings undertaken to determine the amount which the Defendants/case evaluation rejectors "must pay." MCR 2.403(O)(1) required the Defendants to pay case evaluation sanctions. Fraser Trebilcock's attorneys rendered services during the Trial Court's post-judgment proceedings conducted to determine the amount which the Defendants "must pay." There is a direct causal nexus between the Defendants' rejection of case evaluation, Defendants' obligation to pay case evaluation sanctions and the proceedings to determine the amount of case evaluation sanctions which the Defendants must pay. For that reason, the Trial Court correctly included the attorney fees for the services rendered during the case evaluation sanctions proceedings within its award of case evaluation sanctions.

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[26] *See*, n. 25, *supra*.
[27] MCR 2.403(O)(6)(b).

D. Alternatively, even if there is a temporal limitation on an award of case evaluation sanctions for the time period ending 28 days after the trial court denies a rejector's motion for new trial (which there is not), the trial court correctly included attorney fees for the services provided during both those 28 days and the stipulated continuation of the case evaluation proceedings through the entry of the Trial Court's Final Order.[28]

Assuming arguendo, that there is a "temporal nexus" which limits the recovery of case evaluation sanctions to the fees for the services provided through the 28th day after the denial of the case evaluation rejector's motion for a new trial, the instant Trial Court's award of case evaluation sanctions correctly included attorney fees for the services provided within those 28 days and for the services provided during the stipulated continuation of the case evaluation proceedings.

MCR 2.403(O)(8) does not require the Trial Court to conduct an evidentiary hearing and make its decision within 28 days after the entry of either the judgment or an order denying a new trial motion. Instead, the court rule merely requires the party seeking case evaluation sanctions to file its motion within 28 days after the entry of the latter. Fraser Trebilcock clearly complied with MCR 2.403(O)(8)'s filing requirement.[29]

In any event, the Trial Court had scheduled its evidentiary hearing for March 9, 2011 which was 22 days after the Trial Court had denied the Defendants' new trial motion.[30] If the Trial Court had been able to conduct its evidentiary hearing as scheduled, the parties would have presented their respective expert witnesses' testimony on that day. Depending upon what had occurred at that hearing, there may not have been a need for any further services after March 9.

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[28] *See,* fn. 2, p. 1, *supra.*
[29] The Defendants have failed to argue to the contrary.
[30] Exhibit 3 - February and March, 2011 calendar pages.

However, the Trial Court was unable to conduct its hearing on March 9, 2011. For that reason, the parties **stipulated** to take the *de bene esse* depositions of their experts, file the transcripts, submit post-deposition briefs and present their oral arguments to the Trial Court on May 6, 2011. The parties participated in the stipulated continuation of these activities to determine the amount of case evaluation sanctions which the Defendants "must pay."[31]

Generally, one's acceptance of a continuance precludes one from challenging the continuance on appeal.[32] Likewise, a party which waives a right protected by a rule of practice may not challenge the loss of that right on appeal.[33] The Defendants have not sought appellate review of the continuation of the March 9 hearing to May 6, 2011. Regardless, the Defendants agreed that because the March 9 hearing did not occur, the parties would take the *de bene esse* depositions of their expert witnesses, submit post-deposition briefs, and present their oral arguments to the Trial Court on May 9, 2011. In light of their stipulation to this procedure, the Defendants cannot complain about the inclusion of attorney fees for the services rendered during the stipulated continuance of the supposed "temporal nexus."

RELIEF REQUESTED

For the reasons stated in this Reply Brief and in its Application for Leave to Appeal as Cross-Appellant, Fraser Trebilcock requests the Court to grant its Application for Leave to Appeal as Cross-Appellant, find that the proceedings to obtain the award of case evaluation sanctions were necessitated by the Defendant's rejection of the case evaluation and reverse the Court of Appeals' decision.

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[31] MCR 2.403(O)(1).
[32] *Richardson v Michigan Bell Telephone Co.*, 256 Mich 444, 446; 240 NW 65 (1932).
[33] *See generally, Westgate v Adams,* 293 Mich 559, 564; 292 NW 491 (1940) and authority cited therein.

Respectfully submitted,

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Dated: May 23, 2014

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